UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO
Bankruptcy Judge A. Bruce Campbell

In re:	)	
	)	
PROFESSIONAL HOME HEALTH CARE, INC., a Colorado corporation, EIN 84-0932008	)	Case No. 01-12254 ABC Chapter 11
	)	
Debtor.	)	
_____	)	
	)	
PROFESSIONAL HOME HEALTH CARE, INC., a Colorado corporation,	)	Adversary No. 01-1116 ABC
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
COMPLETE HOME HEALTH CARE, LLC, a Colorado limited liability company, JUDY RUZICKA, RODNEY DUFOUR, BARBARA CICCONE, DIERDRA DAUGHERTY, CATHY KAUFMAN, PAM MERRILL, HOLLY DAVIS, and JOHN AND JANE DOES NO. 1-10,	)	
	)	
Defendants.	)	

ORDER DISMISSING DEFENDANTS' CLAIMS
AGAINST SHERYL BELLINGER

At the Rule 16 status conference held in this case, this court raised ***sua sponte*** the question of whether this court has jurisdiction over the defendants' claims against Sheryl Bellinger ("Bellinger"). [1] Plaintiff/debtor, of which Bellinger is the principal and its board president, brought this complaint against defendants alleging breach of fiduciary duty, civil conspiracy and tortious interference with contract in connection with the defendants' conduct in leaving the employ of the debtor and forming a competing entity. Debtor seeks damages and injunctive relief.

[1]Defendants have improperly framed their claims against Bellinger as third party claims. They are not. Defendants do not allege that Bellinger is or may be liable to them for all or part of the plaintiff's claims against them. Fed.R.Civ.P. 14. Rather, they allege what would be more in the nature of counterclaims or crossclaims, respectively, if Bellinger had been added as a plaintiff or defendant. Fed.R.Civ.P. 19.

In defendants' answer to the complaint, they counterclaimed against the debtor and asserted their "third party complaint" against Bellinger, not previously a party to this action, alleging defamation, abuse of process in connection with the debtor's commencement of this adversary proceeding, illegal restraint of trade or commerce, intentional interference with contract and business advantage and outrageous conduct. The debtor and Bellinger responded, through the same counsel,[2] with denials and affirmative defenses, asserting that the defendants' claims against Bellinger were non core over which the court could assert jurisdiction pursuant to 28 U.S.C. § 157(c). In their responsive pleading, neither debtor nor Bellinger asserted claims against the other.

Defendants pray in their "third party complaint" for an award of damages against debtor and Bellinger "in an amount to be proven at trial." That notwithstanding, in the parties' Joint Proposed Scheduling Order submitted in advance of the Rule 16 conference and in Defendants' Fourth Supplemental Rule 26(a)(1) Disclosures, as to computation of damages, the defendants recited:

> Without waiving their right to supplement this computation of damages to include a calculation of monetary damages, the Defendants hereby disclose that at this time, **they seek damages in the nature of injunctive relief** and attorneys' fees only as to each of their claims. A computation of attorneys' fees will be provided upon conclusion of this case as such fees continue to accrue each day.

The court afforded the parties the opportunity to brief the question of the court's jurisdiction over the defendants' claims against Bellinger. Defendants urge this court to retain jurisdiction. They argue that the claims against Bellinger are core and assert this is so because the claims are made against Bellinger as the president and agent of the debtor, as debtor in possession, and are, therefore, the equivalent of a suit against the debtor. Defendants argue "[i]n the alternative, and at the very least, the claims against Ms. Bellinger are 'related to' PHHC's bankruptcy proceeding." They reason that "the Defendants' claims for damages against Bellinger are based on allegations of her misconduct in the administration of the bankruptcy estate." Finally, relying on ***In re Sizzler***, 262 B.R. 811 (Bankr.C.D.Cal.2001), defendants contend that jurisdiction may lie, in that Bellinger *may* be entitled to be indemnified by the debtor if defendants are successful in their claims against her.[3]

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[2]Bellinger has since filed a Notice of Appearance, pro se. The file, however, does not contain a motion by Bellinger's attorney seeking to withdraw from representing her in this case.

[3]The facts of ***Sizzler*** are inapposite to those before this court, and this court neither agrees with nor is bound by the analysis of the ***Sizzler*** court. ***Sizzler*** involved the post confirmation suit brought by the reorganized debtor against a law firm which had represented the debtor in state court personal injury cases. The action sought injunctive and declaratory relief to prevent the law firm from continuing to file proofs of claim for pre petition fees. The attorneys counterclaimed against the debtor, an officer of the debtor and the debtor's insurer for fraud and

This court is not persuaded by the arguments propounded by the defendants. To the extent the claims against Bellinger are made against her in the capacity of agent of the debtor, the claims are claims against the debtor, albeit acting through Bellinger. There is little question that this court has jurisdiction to hear and determine those claims, except to the extent these may be properly characterized as "personal injury tort" claims. ***28 U.S.C. § 157(b)(2)(B)***. To the extent the claims are brought against Bellinger, individually, the debtor may or may not have liability for her conduct. Consequently, the question of this court's jurisdiction over those claims is more tenuous.

This court's jurisdiction over matters is circumscribed in 28 U.S.C. § 157. Bankruptcy courts clearly have jurisdiction to hear and determine core matters, matters which arise under the Bankruptcy Code or arise in a case under the Bankruptcy Code. ***In re Gardner***, 913 F.2d 1515, 1518 (10th Cir. 1990). Contained in section 157(b)(2) is a nonexclusive list of core matters. The claims against Bellinger are not core matters. Core matters are matters that do not exist independent of Title 11 and its administration. Bankruptcy judges may also hear a proceeding that is not a core proceeding but that is otherwise "related to" a case under title 11. ***28 U.S.C. § 157(c)(1)***. The bankruptcy court, however, may or may not be able to determine such non core matters.[4] At best, the defendants' claims against Bellinger are "related to" a case under Title 11.

There is no definition within section 157 of what is a "related to" matter. The Tenth Circuit in ***Gardner*** purportedly adopted what has come to be referred to as the ***Pacor*** test[5] for

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misrepresentation and sought damages jointly and severally against the three defendants. The parties reached a stipulation which dismissed the claims against the debtor and the insurer. The law firm then sought to dismiss its counterclaim against the officer without prejudice or to have the court permissively abstain from the counterclaim against the officer. The officer opposed the motion seeking to have it dismissed with prejudice or litigated. Before addressing the issues before it, the court determined that the counterclaim against the officer was a core proceeding because the suit against the officer, as agent of the debtor, was in essence a suit against the debtor and because it involved both pre and post petition conduct bearing on the administration of the case. As an alternative ground for jurisdiction over the counterclaim, the court held that it was "related to" ***Sizzler's*** case because there was an indemnification which ran from the debtor to the officer and the confirmed plan had explicitly provided that the bankruptcy court would retain jurisdiction to adjudicate the claim of indemnification.

[4]Unless the parties consent to the bankruptcy court's hearing and determining the related matter, the bankruptcy court must submit proposed findings of fact and conclusions of law to the district court for *de novo* review and the entry of a final order.

[5]The Third Circuit merely recited what it referred to as the "ususal articulation of the test for determining whether a civil proceeding is related to bankruptcy." ***Pacor, Inc. v. Higgins***, 743 F.2d at 994 citing ***In re Hall***, 30 B.R. 799, 802 (M.D. Tenn 1983); ***In re General Oil Distributors, Inc.***, 21 B.R. 888, 892 n.13 (Bankr.E.D.N.Y. 1982); ***In re Air Duct Corp.***, 8 B.R.

determining what is a "related to" matter. ***In re Gardner***, 913 F.2d at 1518 citing ***Pacor, Inc. v. Higgins***, 743 F.2d 984, 994 (3rd Cir.1984). ***Pacor's*** oft-cited test is:

> whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy. Although the proceeding need not be against the debtor or his property, the proceeding is related to the bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action in any way, thereby impacting on the handling and administration of the bankruptcy estate. ***Pacor, Inc. v. Higgins***, 743 F.2d at 994 (citations omitted).

The ***Pacor*** test is both amorphous and broad. The language, "could conceivably have any effect," would seem to expand the bankruptcy court's jurisdiction for almost any litigation however remotely related.[6] However, neither the Third nor the Tenth Circuit applies the language as broadly as a literal reading would allow. An examination of the facts of both ***Gardner*** and ***Pacor*** is essential to an understanding of the ***Pacor*** test as applied by the Tenth Circuit in ***Gardner***.

Gardner involved a dispute between the Internal Revenue Service ("IRS"), which held a tax lien against the debtor's property, and the former spouse of the debtor ("Mrs. Gardner")with respect to the IRS's rights against the debtor's property. Prior to the debtor ("Mr. Gardner") filing his petition, Mrs. Gardner had initiated divorce proceedings, and the IRS had filed a notice of tax lien against Mr. Gardner. Post petition, the state court in the divorce proceeding entered an order awarding most of the marital property to Mrs. Gardner. Mrs. Gardner sued Mr. Gardner's bankruptcy trustee for recovery of the property the state divorce court had vested in her. The bankruptcy court determined that upon the entry of the divorce decree, Mr. Gardner's interest in the property was extinguished, and any interest the government claimed in the property was also extinguished. On appeal, the IRS challenged the jurisdiction of the bankruptcy court to have determined the respective rights between the IRS and Mrs. Gardner once the bankruptcy court had determined that the debtor had no interest in the property.

The Tenth Circuit concluded that once the property

> leaves the bankruptcy estate, . . . the bankruptcy court's jurisdiction typically lapses. . . . and the property's relationship to the bankruptcy proceeding comes to an end. Thus, the bankruptcy court lacks related jurisdiction to resolve controversies between third party creditors which do not involve the debtor or his property unless the court cannot complete administrative duties without resolving

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848, 851 (Bankr.N.D.N.Y.1981); 1 *Collier on Bankruptcy* ¶ 3.01 at 3-49.

[6]If one reads and interprets the ***Pacor*** test literally, it would permit a bankruptcy court to hear any suit against a corporation which may affect its stock value if the debtor merely holds a share of stock in that corporation.

the controversy.

In re Gardner, 913 F.2d at 1518. The court's subsequent analysis of the impact of the dispute between the ex wife and the IRS on the bankruptcy estate is instructive:

> This case involves the conflict between two creditors over property no longer a part of the bankruptcy estate. The conflict between the government and Mrs. Gardner ***is irrelevant to the bankruptcy estate, because the disputes regarding their stake in Mr. Gardner's property have been resolved . . . and neither Mr. Gardner nor the bankruptcy estate are affected by the dispute between Mrs. Gardner and the government.*** ***In re Gardner***, 913 F.2d at 1518-1519 (emphasis added).

The breadth of the "could conceivably have any effect" language of the ***Pacor*** test could engender the obvious argument that the dispute between the IRS and Mrs. Gardner was "related to" Mr. Gardner's case. If the lien of the IRS, and therefore the debtor's tax liability, might have been satisfied by the property awarded to the ex wife, then the estate of the debtor would be directly and immediately affected--dollar for dollar. The Tenth Circuit did not expressly consider and reject such an argument, but nevertheless declined jurisdiction of the dispute as not "related to" this bankruptcy estate. In so doing, the Tenth Circuit signaled its inclination for limiting the jurisdiction of the bankruptcy court despite having embraced a test which, if applied literally, would have the opposite effect.

The ***Pacor*** case involved a state court products liability suit brought by the plaintiff who allegedly suffered injury by exposure to asbestos supplied by Pacor ("Higgins v. Pacor"). Pacor filed a third party complaint against Johns-Manville Corporation, the original manufacturer of the asbestos product. Upon Manville becoming a Chapter 11 debtor, Pacor removed the suit to bankruptcy court. The bankruptcy court remanded the entire action to the state court. The district court on appeal ruled that the bankruptcy court should have retained jurisdiction over Pacor's claim against Manville, when remanding the Higgins claim against Pacor for lack of jurisdiction. The Third Circuit upheld the district court's decision, and it is in that context that the ***Pacor*** test for "related to" jurisdiction emerged.

The Third Circuit simultaneously articulated a very expansive definition of "related to" but applied it to the facts before it with considerable restraint.[7] In the final analysis, the Third

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[7]The Third Circuit started from the proposition that:

> In enacting section 1471(b) [now 28 U.S.C. § 1334(b) as modified by 28 U.S.C. § 157(c)], Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate. See H.Rep. No. 598, 95th Cong., 2d Sess., 43-48, reprinted in 1978 U.S.Code Cong.& Ad.News 5963, 6004-08.

Circuit, in the context of the litigation before it involving multiple parties with the potential for liability arising out of the same set of facts, defines the phrase "could conceivably have any effect on the estate" to mean effect by way of issue preclusion.[8]

The Third Circuit was also confronted with an argument similar to that raised in the instant case by the defendants that debtor's possible requirement to indemnify Bellinger may have an effect on the debtor's case. It rejected the argument as follows:

> Pacor stresses that the Higgins-Pacor claim would affect the Manville bankruptcy estate, in that without a judgment for plaintiff Higgins in that action, there could never be a third party indemnification claim against Manville. This does not alter our conclusion. At best, one could say that a judgment against the plaintiff on the

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> . .The jurisdiction of the bankruptcy courts to hear cases related to bankruptcy is not without limit, however, and there is a statutory, and eventually constitutional, limitation to the power of a bankruptcy court. For subject matter jurisdiction to exist, therefore, there must be some nexus between the "related" civil proceeding and the title 11 case. *See* ***In re Hall***, 30 B.R. 799, 802 (M.D.Tenn.1983); 1 *Collier on Bankruptcy* ¶3.01, at 3-48 to 3-49 (15th ed. 1982).

Pacor, Inc. v. Higgins, 743 F.2d at 994 (case citations omitted).

[8] Our examination of the Higgins-Pacor-Manville controversy leads us to conclude that the primary action between Higgins and Pacor would have no effect on the Manville bankruptcy estate, and therefore is not "related to" bankruptcy within the meaning of section 1471(b). At best, it is a mere precursor to the potential third party claim for indemnification by Pacor against Manville. Yet the outcome of the Higgins-Pacor action would in no way bind Manville, in that it could not determine any rights, liabilities, or course of action of the debtor. Since Manville is not a party to the Higgins-Pacor action, it could not be bound by res judicata or collateral estoppel. . . Even if the Higgins-Pacor dispute is resolved in favor of Higgins (thereby keeping open the possibility of a third party claim), Manville would still be able to litigate any issue, or adopt any position, in response to a subsequent claim by Pacor. Thus, the bankruptcy estate could not be affected in any way until the Pacor-Manville third party action is actually brought and tried.

Pacor, Inc. v. Higgins, 743 F.2d at 995.

> primary claim would make absolutely certain that the Manville estate could never be adversely affected. This does not prove the converse, however, that a judgment in favor of the plaintiff Higgins could not itself result in even a contingent claim against Manville, since Pacor would still be obligated to bring an entirely separate proceeding to receive indemnification.

Pacor, Inc. v. Higgins, 743 F.2d at 995. In distinguishing the cases cited by Pacor in support of the bankruptcy court retaining jurisdiction of the Higgins claim against Pacor, the Third Circuit reasoned that the debtor must be liable "automatically" by the outcome of the litigation between the nondebtors for there to be "related to" jurisdiction. ***Id.*** When stripped of dicta, what ***Pacor*** holds, in the context of possible liability of multiple parties, including the debtor, based on common issues of fact, is that unless the outcome of litigation between the nondebtors would preclude the debtor by way of res judicata or collateral estoppel in other litigation, the bankruptcy court does not have jurisdiction over the litigation between the nondebtors

Gardner and ***Pacor*** are very different cases factually but both cases send the same message. Bankruptcy court jurisdiction is not without bounds regardless of the breadth of the test used to determine "related to" jurisdiction.

The facts of the case before this court resemble the facts of ***Pacor*** far more than they do those of ***Gardner***. Thus, this court is guided in deciding this case by the jurisdictional restraint reflected in ***Gardner*** and the ultimate holding of ***Pacor***. The defendants' request for injunctive relief and attorneys fees against Bellinger, individually, relates to their claims against her in connection with her alleged intentional conduct prior to and after their leaving the employ of the debtor. Because there can be no collateral estoppel or res judicata effect on the debtor by any ruling against Bellinger in a separate proceeding against her, such claims are not "related to" this bankruptcy.[9]

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[9]Debtor's counsel filed a brief regarding jurisdiction which argued that there might be a collateral estoppel effect on Bellinger by any decision favorable to the defendants on their counterclaims against debtor in this action. The ruling of ***Pacor*** instructs this court not to consider the impact on Bellinger in its jurisdictional analysis. It is the impact on the debtor which drives this court's "related to"jurisdiction. The debtor advances other "common sense and fairness" arguments ***in favor of*** this court retaining jurisdiction but such arguments are unavailing. As noted by the Third Circuit in ***Pacor***:

> [T]he mere fact that there may be common issues of fact between a civil proceeding and a controversy involving the bankruptcy estate does not bring the matter within the scope of section 1471(b) [now 28 U.S.C. § 1334(b) as modified by 28 U.S.C. § 157(c)]. Judicial economy itself does not justify federal jurisdiction. . . . "[J]urisdiction over nonbankruptcy controversies with third parties who are otherwise strangers to the civil proceeding and to the parent bankruptcy does not exist." ***In re Haug***, 19 B.R. 223, 224-25 (Bankr.D.Ore.1982).

This court also rejects the defendants' assertion that the potential for the debtor to be liable for any judgment they may obtain against Bellinger is sufficient to trigger this court's "related to" jurisdiction. Neither the debtor nor Bellinger, whose right it is to assert such a claim, have even intimated that a right of indemnification exists. That defendants ***may*** learn of such a right through future discovery, as they contend, does not establish jurisdiction. Moreover, this tenuous thread on which jurisdiction might hang, is severed by defendants' explicit admission that what they really seek now on their counterclaims is injunctive relief and not monetary damages, except attorneys' fees. If Bellinger is enjoined from conduct offensive to these defendants, such relief in no way affects this bankruptcy estate.

For the reasons stated above, it is ORDERED that the defendants' claims against Sheryl Bellinger are DISMISSED, without prejudice.

Dated this ____ day of _____, 2002.

BY THE COURT:

_____
A. Bruce Campbell, Judge
United States Bankruptcy Court

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Pacor, Inc. v. Higgins, 743 F.2d at 994 (citation omitted).